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(21)

आदेश पत्रक

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..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

HIGH COURT OF CHHATTISGARH AT BILASPUR

S.B. HON'BLE SHRI JUSTICE DHIRENDRA MISHRA, J

CRIMINAL APPEAL. NO. 471/2005

APPELLANT — Moti Ram @ Gutaru
Aged – 27 yrs. S/o Ganga Ram

VERSUS

RESPONDENT — State of C.G.

And

CRIMINAL APPEAL. NO. 298/2006

APPELLANT — **Ram Kishun** @ Bhordul
Aged – 20 yrs, S/o Bhordul
R/o. Chirai Pani, P.S. Manendra Garh - Distt. Koriya C.G.

VERSUS

RESPONDENT — State of C.G.

4.10.2007

Shri Rakesh Sahu, counsel for the appellants.
Shri Arun Sao, GA for the State/respondent.

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Heard on M.Cr.P.No. 882/06, application for condonation of delay in filing the instant appeal as the same been filed with a delay of 1349 days.

For the reasons indicated in the above application and also considering the fact that the connected Cr.A.No. 471/05 preferred by appellant Motiram @ Gutru is pending adjudication, delay in filing the instant appeal is condoned.

Cr.A.No. 471/05 preferred by appellant Motiram @ Gutru & Cr.A. 298/06 preferred by appellant Ramkishun @ Bhordul are being disposed of by this common judgment as both these appeals are directed against the judgment of conviction and order of sentence dated 15.6.2002 passed in S.T.No. 03/02 whereby learned Additional Sessions Judge, Manendragarh, Distt. Koria has convicted the appellants Motiram @ Gutru and Ramkishun @ Bhordul under Sections 342 of IPC, sentenced each of them to undergo RI for six months, pay a fine of Rs.200/- and in default thereof, to undergo additional imprisonment for two months. Appellants Motiram @ Gutru and Ramkishun @ Bhordul have been also convicted under Sections 376, 376/34 of IPC respectively and each of them has been sentenced to undergo RI for 10 years, pay a fine of Rs.1,000/- and in default thereof, to further undergo imprisonment for five months.

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2. Case of the prosecution, in brief, is that on 6.8.2001 at about 12.00 noon the prosecutrix, aged about 12 years, was going towards field for transplantation of paddy when the appellants caught her near the house of Ramkishun @ Bhordul and took her inside his house where Ramkishun @ Bhordul confined her by bolting the door from outside. Appellant Motiram committed rape with her after lying her on the ground and gagging her whereas Ramkishun stood guard. She was kept in confinement up to 6.00 p.m. and she was freed only when Ramkishun shouted that villagers have learnt about the incident. The prosecutrix was threatened not to disclose the incident, however, she narrated the incident to her parents as also the neighbourers. Thereafter, report was lodged on the following day in Police Station Manendragarh vide Ex.P/1.

3. During investigation the prosecutrix was sent for medical examination to Govt. Hospital Manendragarh where Dr. Neelam Tirki examined her and gave her report of Ex.P/6. Wearing apparels of the prosecutrix were taken into possession under Ex.P/4 and sent for chemical examination to the doctor, who advised chemical examination for confirmation of presence of semen. After completing investigation charge sheet was filed against the appellants in the Court of Judicial Magistrate First Class, Manendragarh and the same was received on transfer for trial by the learned Additional Sessions Judge.

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4. During trial seven witnesses were examined by the prosecution. Thereafter, statements of the accused persons were recorded in which they denied the material appearing against them in the prosecution case and pleaded innocence and false implication. However, learned trial Court after hearing counsel for the respective parties convicted and sentenced the appellants as mentioned in paragraph 1 of this judgment.

5. Learned counsel for the appellants submits that there is no evidence that the prosecutrix was less than 16 years of age on the date of incident as no oral or documentary evidence has been adduced by the prosecution in this regard and the trial Court has also not recorded any finding with respect to age of the prosecutrix. The prosecutrix has made allegations of rape only against appellant Motiram whereas allegation against Ramkishun is that he confined her inside his house, bolte the door from outside and facilitated Motiram in committing rape with her. Referring to statement of the prosecutrix, it is argued that the allegations are that she was confined inside the house at 12.00 noon and freed only at 6.00 p.m. by the accused persons, that too, when the villagers learnt that Motiram and the prosecutrix are confined inside the house of Ramkishun. The prosecutrix has claimed that she sustained numerous injuries over her person on account of dragging on the floor

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and assault by belt, but there is no medical corroboration to the above allegation as Dr. Neelam Tirki (PW-6) who examined the prosecutrix on the same day, has not found any external or internal injury on her person.

6. On the other hand, learned counsel for the State/respondent supported impugned judgment of the trial Court.

7. Conviction of the appellants is based on the statement of prosecutrix (PW-3) and her mother Jahida (PW-4)

8. Prosecutrix has stated in her deposition before the Court that she was going alone to village Banji from Chiraipani at about 10.00 a.m. as the other labourers had gone ahead. Just 70-75 steps away from her house, there is the house of accused Bhordul, where accused/appellants met her and took her inside the house. Both of them tied both her hand with the cloth and thereafter, appellant Bhordul came out of the house and Moti committed rape with her. The house was bolted from outside. At 6.00 p.m. the door was opened, whereupon she came out and saw her mother and accused Bhordul there. Her hands were untied by her mother. However, accused Moti had fled from there. Her mother took her along with Bhordul to her house. She narrated about the incident to her mother. She was gagged by the accused Moti by inserting pieces of cloth.

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The fact of tying both of her hands by cloth is not mentioned in the FIR. In paragraph 9 of her deposition she has stated that she was dragged by the accused persons for a distance of 20 steps, as a result of which she sustained injuries over her back and her jumper was stained with blood. She also sustained injuries over her leg and toes. The house of Ramdas and Gudda is adjacent to the house of Bhordul. While she was being taken to the room, she had shouted. In paragraph 11 she has stated that it is correct to say that Bhordul was taken by her mother because Motiram resided in the house of Bhordul and her parents did not approve her acquaintance and meeting with appellant Moti However, immediately thereafter she has denied any acquaintance with accused Motiram. In paragraph 13 she has stated that she was subjected to sexual intercourse for the first time by Motiram and before that she had no experience of intercourse. She has told about the injuries over her back and toes to the doctor at the time of medical examination.

9. PW-4 Jahida, mother of the prosecutrix, has stated that her daughter went from the house on the pretext of going to work. However, when she did not return till evening, she enquired from the neighbourhood and at that time she overheard some people talking near the house of Bhordul. When she asked who was talking, accused Motri and Bhordul

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came out of the house and started running away. However, she caught Bhordul, but Moti ran away. The villagers had gathered near her house. Her daughter narrated about the incident that Moti took her to Bhordul's house and committed rape with her after tying both the hands and gagging her. Omissions and contradictions present in her diary statement of Ex.D/1 have also been pointed out in paragraph 5 of her statement. She has also stated that the prosecutrix was putting on *Salwar & Kurta* and there was blood on her back and her *Kurta* was stained with blood. The prosecutrix had told her that Bhordul has assaulted her with belt.

10. Dr. Neelam Tirki (PW-6) has examined the prosecutrix on 7.8.2001 and gave report of Ex.P/6. She has stated that she had examined the prosecutrix and did not notice any external or internal injuries on her private part. There was no mark of injury present on her person. No sign of intercourse was found on her person and she seemed to be accustomed to sexual intercourse. Two vaginal slides were prepared and sent for examination to Forensic Science Laboratory. However, no report of F.S.L. is available on record.

11. After close scrutiny of statements of the prosecutrix and her mother, the same do not inspire confidence for the following reasons:

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(i) according to case of the prosecution the prosecutrix was bodily lifted at 10.00 a.m. while she was proceeding to work to Village Banji along with other labourers and confined in the house of Bhordul along with Moti whereas appellant Bhordul stood guard in front of the door and freed only at 6.00 p.m. The above fact is to be viewed in the background of her admission in paragraph 11 wherein she has admitted that her parents did not approve her acquaintance and meeting with accused Moti. The fact that both of her hands were tied with the cloth, is missing in the FIR of Ex.P/1. It is highly improbable that the prosecutrix while lodging the report immediately after the incident would not mention this fact. This is a clear improvement made by the prosecutrix deliberately to justify her inaction while she was in confinement for a period of 8 hours.

(ii) She has categorically stated that she sustained injuries on her back, toes and leg on account of dragging by the accused persons and she had mentioned thes

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injuries to the investigating officer as also to the doctor at the time of medical examination. However, her version is not corroborated by the medical evidence as the doctor who examined her immediately after the incident has not found any injury on her person or private part. In view of the above fact, the allegation of the prosecutrix in her statement that she was dragged by the accused persons and thereafter, confined in the house of Bhordul where appellant Moti committed sexual intercourse with her, does not inspire confidence.

(iii) The claim of the prosecutrix that it was the first intercourse with Moti and prior to that she had no experience of sexual intercourse, is also belied from the version of Dr. Neelam Tirki (PW-6) who has opined that she is accustomed to sexual intercourse, her vagina admitted two fingers easily and there is no sign of rape.

12. Thus, in view of totality of the facts and circumstances and the evidence available on record, possibility of the prosecutrix being a consenting party cannot be ruled out. The

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	trial Court was not justified in convicting and sentencing the appellants by the impugned judgment under Sections 342, 376, 376/34 of IPC and the same cannot be sustained. 13. In the result, both the appeals preferred by the appellants are allowed. Their conviction and sentence under Sections 342, 376, 376/34 of IPC are set aside. They are acquitted of the above charges. They be set at liberty forthwith, if not required in any other case. sd/- Dhirendra Mishra Judge	